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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON7
8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 SALLY GIBSON,

12 Defendant.
13

NO. CR-03-151-RHW

**ORDER DENYING DEFENDANT'S
MOTION FOR JUDGMENT OF
ACQUITTAL, NEW TRIAL OR
OTHER APPROPRIATE RELIEF**

14 Before the Court is Defendant's Motion for Judgment of Acquittal, New Trial or
15 Other Appropriate Relief (Ct. Rec. 268). A hearing was held on the motion on
16 November 21, 2005, in Spokane, Washington. Defendant was present and represented
17 by Beth M. Bollinger. The Government was represented by George Jacobs.

18 **A. Jurisdiction**

19 On March 24, 2005, Defendant filed her notice of appeal (Ct. Rec. 234).
20 Generally, once an appeal has been filed, the district court is divested of jurisdiction
21 over the case at hand. *United States v. Taylor*, 648 F.2d 565, 572 (9th Cir. 1981). An
22 exception to this general rule lies if "'extraordinary circumstances' outweigh the
23 considerations of administrative convenience and judicial economy." *Id.* Because
24 Defendant has filed an appeal, under *Taylor*, then, she must prove the existence of
25 circumstances sufficiently extraordinary to warrant dual proceedings before the Court
26 can exercise jurisdiction over Defendant's motion. *Id.* Defendant is unable to do so,
27 because, in this case, there are no extraordinary circumstances that outweigh the
28 administrative convenience and judicial economy.

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1 Alternatively, Defendant relies on the United States Supreme Court case of
2 *United States v. Cronic*, 466 U.S. 648 (1984), to support her contention that this Court
3 has jurisdiction to hear this case. In that case, while a direct appeal was pending, the
4 defendant filed a motion to vacate his conviction on the ground that he had newly-
5 discovered evidence of perjury and that the Government knew or should have known of
6 that perjury, and to challenge the competence of his trial counsel. *Id.* at 652. Although
7 the district court refused to hear the motion, the Tenth Circuit reversed the conviction
8 because it inferred that the defendant's constitutional rights to effective assistance of
9 counsel had been violated. In a footnote, the Supreme Court held that the district court
10 erred in determining it did not have jurisdiction to entertain the claim for ineffective
11 assistance of counsel in a motion for new trial under Federal Rule of Criminal
12 Procedure 33. *Id.* at 667 n.42.

13 It is this footnote upon which Defendant relies to assert that this Court has
14 jurisdiction to hear this motion. Fed. R. Crim. P. 33 authorizes the Court, upon a
15 motion by the defendant, to vacate any judgment and grant a new trial if the interest of
16 justice so requires. The Rule specifically states that a motion for new trial based on
17 newly-discovered evidence must be filed within 3 years after the verdict, and sets forth
18 that if an appeal is pending, the court may not grant a motion for a new trial until the
19 appellate court remands the case. Fed. R. Crim. P. 33(b)(1). Any motion for a new trial
20 grounded on any reason other than newly-discovered evidence, however, must be filed
21 within 7 days after the verdict. Fed. R. Crim. P. 33(b)(2). Defendant is not making the
22 argument that she is entitled to a new trial based on newly-discovered evidence and,
23 therefore, would be precluded from claiming other grounds for a new trial by the 7-day
24 time limit, notwithstanding the footnote in *Cronic*.

25 Defendant also asserts that the Court has the authority to issue a writ of coram
26 nobis, and it is under this authority that the Court can hear Defendant's motion. Federal
27 courts have authority to issue the writ of coram nobis under the All Writs Act, 28

1 U.S.C. § 1651(a).¹ The purpose is to correct errors of fact of such fundamental
 2 character as to render the proceeding itself irregular and invalid. *Taylor*, 648 F.2d at
 3 570 n.14. Also, “[t]he writ of error coram nobis affords a remedy to attack a conviction
 4 when the petitioner has served his sentence and is no longer in custody.” *United States*
 5 *v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005) (citations omitted). “Specifically, the writ
 6 [of coram nobis] provides a remedy for those suffering from the lingering collateral
 7 consequences of an unconstitutional or unlawful conviction based on errors of fact and
 8 egregious legal errors.” *Id.* (citations omitted).

9 To qualify for coram nobis relief, defendant must satisfy four requirements: (1) a
 10 more usual remedy is not available; (2) valid reasons exist for not attacking the
 11 conviction earlier; (3) adverse consequences exist from the conviction sufficient to
 12 satisfy the case or controversy requirement of Article III; and (4) the error is of the most
 13 fundamental character. *Kwan*, 407 F.3d at 1011 (citations omitted).

14 Here, Defendant cannot satisfy the first element because a more usual remedy is
 15 available, that is, the pending direct appeal before the Ninth Circuit.

16 Finally, the Court disagrees that it can rely on its inherent supervisory power “to
 17 correct any error in the record and provide relief as appropriate,” as Defendant suggests.
 18 *See Carlisle v. United States*, 517 U.S. 416, 421, 426 (1996) (“Whatever the scope of
 19 this ‘inherent power,’ however, it does not include the power to develop rules that
 20 circumvent or conflict with the Federal Rules of Criminal Procedure. . . . There is
 21 simply no room in the text of Rules 29 and 45(b) for the granting of an untimely
 22 postverdict motion for judgment of acquittal, regardless of whether the motion is
 23 //

24
 25 ¹ (a) The Supreme Court and all courts established by Act of Congress
 26 may issue all writs necessary or appropriate in aid of their respective
 jurisdictions and agreeable to the usages and principles of law.

27 (b) An alternative writ or rule nisi may be issued by a justice or judge
 28 of a court which has jurisdiction.

28 U.S.C. § 1651.

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1 accompanied by a claim of legal innocence, is filed before sentencing, or was filed late
2 because of attorney error.”).

3 Accordingly, Defendant’s motion is denied because the Court does not have
4 jurisdiction to hear the motion.

5 **B. Substantive Analysis**

6 Even if this Court were to have jurisdiction to hear Defendant’s motion, the Court
7 would not disturb its previous ruling with regard to Defendant’s Motion for Judgment
8 of Acquittal or New Trial (Ct. Rec. 193). Defendant takes issue with statements that
9 were made at the sentencing hearing. The record before the Court at sentencing was
10 different than the record that was before the jury. At sentencing, Defendant spoke at
11 great lengths regarding her involvement in the conspiracy and the individual charges.
12 Victims testified, and the United States Probation Officer prepared a detailed
13 presentence report. Any statements made at the sentencing hearing were made in
14 relationship to Defendant’s sentence, and were not intended to be taken as a comment
15 on the sufficiency of the evidence that was presented at trial.

16 Moreover, if the Court intended to overturn a prior order, or if the Court
17 genuinely believed that there was not sufficient evidence in the record to convict
18 Defendant, it would have made such findings clearly and succinctly on the record.

19 Accordingly, for the reasons stated on the record and in this order,

20 **IT IS HEREBY ORDERED:**

21 1. Defendant’s Motion for Judgment of Acquittal, New Trial or Other
22 Appropriate Relief (Ct. Rec. 268) is **DENIED**.

23 **IT IS SO ORDERED.** The District Court Executive is hereby directed to enter
24 this order and to furnish copies to counsel and U.S. Probation.

25 **DATED** this 22nd day of November, 2005.

26
27 s/ ROBERT H. WHALEY
Chief United States District Judge

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